In the Supreme Court of the United States.

OCTOBER TERM, 1918.

THE UNITED STATES, APPELLANT,
v.
CONRAD S. BABCOCK. } No. 708.

THE UNITED STATES, APPELLANT,
v.
HERBERT B. HAYDEN. } No. 915.

APPEALS FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

In each of these cases the appellee is an Army officer and sues to recover the value of personal property claimed to have been lost or destroyed in the military service.

In No. 708 the property was a horse belonging to appellee which, it is claimed, died at the Presidio in California, in July, 1910, of indigestion caused by eating the Government ration of oats and barley fed him at the post.

In No. 915 the property consisted of clothing and other articles of personal property lost in a storm and

hurricane at Texas City, where the appellee was on duty.

STATUTES INVOLVED.

In both cases the claim is predicated on the act of March 3, 1885 (23 Stat., 350), which is as follows:

> That the proper accounting officers of the Treasury be, and they are hereby, authorized and directed to examine into, ascertain, and determine the value of the private property belonging to officers and enlisted men in the military service of the United States which has been, or may hereafter be, lost or destroyed in the military service, under the following circumstances:
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> First. When such loss or destruction was without fault or negligence on the part of the claimant.
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> Second. Where the private property so lost or destroyed was shipped on board an unseaworthy vessel by order of any officer authorized to give such order or direct such shipment.
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> Third. Where it appears that the loss or destruction of the private property of the claimant was in consequence of his having given his attention to the saving of the property belonging to the United States which was in danger at the same time and under similar circumstances. And the amount of such loss so ascertained and determined shall be paid out of any money in the Treasury not otherwise appropriated, and shall be in full for all such loss or damage: *Provided*, That any claim which shall be presented and acted on under authority of this act shall be held as finally determined, and

shall never thereafter be reopened or considered: *And provided further*, That this act shall not apply to losses sustained in time of war or hostilities with Indians: *And provided further*, That the liability of the Government under this act shall be limited to such articles of personal property as the Secretary of War, in his discretion, shall decide to be reasonable, useful, necessary, and proper for such officer or soldier while in quarters, engaged in the public service, in the line of duty: *And provided further*, That all claims now existing shall be presented within two years and not after from the passage of this act; and all such claims hereafter arising be presented within two years from the occurrence of the loss or destruction.

No. 915 is predicated wholly upon this statute. The petition in No. 708, however, is double-barreled, and the right to recover is also predicated on section 3482 R. S., as amended by the act of June 22, 1874 (1 Supp. R. S., 37), which is as follows:

SEC. 3482. Any field, or staff, or other officer, mounted militiaman, volunteer, ranger, or cavalryman, engaged in the military service of the United States, who sustains damage without any fault or negligence on his part, while in the service, by the loss of a horse in battle, or by the loss of a horse wounded in battle, which dies of the wound, or which, being so wounded, is abandoned by order of his officer and lost, or who sustains damage by the loss of any horse by death or abandonment because of the unavoidable dangers of the sea, when

on board a United States transport vessel, or because the United States fails to supply transportation for the horse, and the owner is compelled by the order of his commanding officer to embark and leave him, or in consequence of the United States failing to supply sufficient forage, or because the rider is dismounted and separated from his horse and ordered to do duty on foot at a station detached from his horse, or when the officer in the immediate command orders the horse turned out to graze in the woods, prairies, or commons, because the United States fails to supply sufficient forage, and the loss is consequent thereon, or for the loss of necessary equipage, in consequence of the loss of his horse, shall be allowed and paid the value thereof, not to exceed two hundred dollars.

Act of June 22, 1874:

CHAP. 395. An act to amend an act entitled "An act to provide for the payment of horses and other property lost or destroyed in the military service of the United States," approved March third, eighteen hundred and forty-nine.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the first section of the act of March third, eighteen hundred and forty-nine, providing for the payment for horses and equipments lost by officers or enlisted men in the military service shall not be construed to deny payment to such officers or enlisted men, for horses which may have

been purchased by them in States in insurrection; and payment in any case shall not be refused where the loss resulted from any exigency or necessity of the military service, unless it was caused by the fault or negligence of such officers or enlisted men.

SEC. 2. That no claims under said section or this amendment thereto shall be considered unless presented prior to the first day of January, eighteen hundred and seventy-six.

The time for filing claims was afterwards extended as follows:

Act of January 9, 1883 (22 Stat., 401):

That the time for filing claims for horses and equipments lost by officers and enlisted men in the military service of the United States, which expired by limitation on the thirty-first day of December, eighteen hundred and seventy-five, be, and the same is hereby, extended to one year from and after the passage of this act; and that all such claims filed in the proper department before the passage of this act shall be deemed to have been filed in due time and shall be considered and decided without refiling.

SEC. 2. That all claims arising under the act approved March third, eighteen hundred and forty-nine, entitled "An act to provide for the payment of horses and other property lost or destroyed in the military service of the United States," and all acts amendatory thereof, which shall not be filed in the proper department within one year from and after the passage of this act, shall be forever barred,

> and shall not be received, considered, or audited by any department of the Government.

Section 2 of the act of August 13, 1888 (25 Stat., 437):

> That the limitation heretofore imposed by law on the presentation by officers or soldiers of claims for the loss of horses and equipments in the military services during the late war is hereby suspended for the period of three years.

Section 3482 above quoted is copied from section 1 of the act of 1849 referred to in the act of June 22, 1874, the only change being that certain provisos contained in the act of 1849 are omitted.

THE FACTS.

In No. 708 the Court of Claims found that at the time of the loss the appellee was a captain in the First Cavalry, United States Army, a mounted officer, on duty at the Presidio, and that he had there a horse which was lost in the military service under the following circumstances: "The Government furnished as the forage ration barley with the awns on it and the horse died of strangulation of the intestines from eating such forage at said place. The loss was without fault or negligence on the part of the plaintiff."

It was further found that the claim was filed in the office of the Auditor for the War Department on November 26, 1910, and was disallowed on July 19, 1911, on the ground that "as the death of officer's horse was not caused by any exigency of the service, nor from a cause incident to or produced by the mili-

tary service, but was the result of a disease to which all horses are subject, no reimbursement can be made under the act of March 3, 1885."

There were also findings to the effect that the Secretary of War had decided that the horse in question was reasonable, useful, necessary, and proper for the plaintiff to have had in his possession while in quarters, engaged in the public service, in line of duty. The court also found that the value of the horse was $200 and rendered judgment for that amount.

In No. 915 the court found that the articles in question were lost or destroyed while the appellee, a first lieutenant, was stationed at Texas City, Tex., on duty with his regiment under the following circumstances:

> The camp was on low ground peculiarly exposed to inundation. August 16, 1915, a hurricane of exceptional violence and duration broke out on the coast of Texas, lasting through that day and the 17th and the 18th, driving the water from the bay up over the camp and totally wrecking and destroying all the tents as well as the wooden structures belonging to the Government. During said hurricane the plaintiff exerted himself to the utmost of his ability to save Government property, to save the lives of other officers and of their families, and to secure his own property from destruction. Notwithstanding all these efforts his tent and shack were swept away and all his personal property therein was destroyed or swept away by the waters. The loss was

without fault or negligence on the part of plaintiff.

The court further found that within two years of the occurrence of the loss appellee presented his claim; that the Secretary of War certified that the articles for which judgment had been rendered were reasonable, useful, necessary, and proper for appellee to have while in quarters engaged in the public service, in the line of duty, and that the prices which have since been allowed by the Court of Claims were reasonable.

It does not appear that any accounting officer of the Treasury has ever examined into and ascertained the value of this property. The court, however, has found that the valuation placed on it by the Secretary of War was fair and reasonable.

It is further found by the court that the auditor for the War Department disallowed the claim and that this disallowance was affirmed by the Comptroller, but there is no finding as to the reasons for the disallowance.

CONTENTIONS OF THE GOVERNMENT.

The Government contends—

First. That the act of 1885, which gives the right to compensation for property of this kind under certain circumstances, gives at the same time a remedy by providing a special tribunal and expressly declaring that the judgment of this tribunal shall be final and conclusive, and hence the Court of Claims has no jurisdiction.

Second. That the special acts applying to the loss of horses which were heretofore in force have no application to the case made in No. 708.

ASSIGNMENTS OF ERROR.

The judgments of the Court of Claims are erroneous because—

1. The court had no jurisdiction of the claim involved in either case.

(*a*) If it had jurisdiction, the facts found do not under the law warrant the judgments rendered.

BRIEF.

The Court of Claims filed no opinion in either of these cases, but based the judgments upon its opinions in the cases of Newcomber (51 C. Cls., 408) and Andrews (52 C. Cls., 373), in which the reasons for its conclusions are fully set out.

Treating both cases as arising under the act of 1885, it follows, as was said by the Court of Claims in *Newcomber* v. *United States, supra,* that "any rights which a claimant is entitled to under the act of 1885 must be found within the four corners of that act."

In other words, the United States has neither agreed to be responsible for nor consented to be sued for such claims, except as that consent was given by the passage of the act of 1885. That act, it is respectfully submitted, not only did not give consent on the part of the Government to have claims of this kind established by suits in the courts,

but expressly withheld that consent and instead enacted that the Government should pay only such amounts as should be ascertained by a special tribunal or agency created for that purpose.

The act first authorizes and directs the proper accounting officers of the Treasury "to examine into, ascertain, and determine the value of the private property belonging to officers and enlisted men in the military service" which has been lost or destroyed under certain specified circumstances. It is then provided that "the amount of such loss so ascertained and determined shall be paid * * * and shall be in full for all such loss or damage," provided, among other things, that the liability of the Government shall be limited "to such articles of personal property as the Secretary of War in his discretion shall decide to be reasonable, useful, necessary, and proper for such officer or soldier while in quarters, engaged in the public service, in the line of duty."

It will be observed that a liability against the Government to pay for the reasonable value of property lost is not declared in general terms. It is simply provided that the Government shall be liable for and pay such claims as shall be established in the manner provided by the act. The plain meaning of the statute is that the Government shall in no event pay any value except such as shall be ascertained by the proper accounting officers of the Treasury. It is equally clear that it shall pay for the loss of no articles of property except such

as the Secretary of War shall certify are reasonably necessary for the use of the officer. It is not required that the accounting officers shall ascertain the value of all property lost by Army officers, but only that he shall examine such property when it has been lost under the circumstances specified in the statute. Before he is authorized to make such a valuation he must find that the loss occurred under these circumstances. The question, therefore, of determining both the value of the property and whether it was lost under circumstances requiring the Government to pay for it are definitely committed to him. Indeed, this is the view taken of the statute by the Court of Claims, for it said in *Newcomber* v. *United States, supra*, at page 420:

> In the action contemplated by the act of 1885 the accounting officers are charged with the duty of ascertaining the value of the articles of personal property lost or destroyed and with determining whether the loss or destruction occurred under one or more of "the circumstances" stated in the act, and in a proper case to ascertain the amount which the Treasury may pay. Their action, to say the least, involves the exercise of judgment and is not merely administrative.

If there was nothing in the act except what has just been quoted, it would therefore be clear that the United States has not by this act opened its courts to claims for the purpose of ascertaining either the value of property lost, or whether it was lost under the circumstances mentioned in the act. But Con-

gress was not content to leave its purpose to that effect where there could be a shadow of doubt about it. The language quoted above to the effect that the amount of loss ascertained in the way provided should be paid and should be in full of all loss or damage, would seem to have been plain enough, but Congress went further, and by a proviso to the act declared:

> That any claim which shall be presented and acted on under authority of this act shall be held as finally determined.

Certainly this would seem to leave no doubt that the remedy given by this act through the tribunal created by it was intended to be the only remedy. But Congress still was not content, and added to the same proviso the words, "and shall never thereafter be reopened." And apparently determined that as the word, "reopened" might be construed so as to apply only to the right of the special tribunal to reverse itself, added the words "or considered."

It is scarcely possible to imagine any stronger language that could be used to make the action of the designated officers absolutely final and conclusive. Whether a claim exists and the amount of it are to be fixed in the way prescribed by the statute, and, in emphatic language, it is declared that action once taken by the special tribunal or agency shall never be reopened or again considered.

The Court of Claims recognizes that no action can be maintained in that court until the remedy provided by the act of 1885 has been resorted to. In the *Necomer* case, *supra*, at page 420, following the

language quoted above, it was said, speaking of the action of the accounting officers of the Treasury:

> But it is not necessarily final. If the facts are undisputed, and the law is not properly applied, or if they refuse to act on claims properly presented, or if payment of their award be refused, this court has jurisdiction to grant relief, because the right is founded upon a law of Congress.

And at pages 424 and 425 it is said, in effect, that judgment can be rendered by the Court of Claims for only such articles as have been certified by the Secretary of War, as required by the act.

The error of this holding is in treating the action of the special tribunal not as final, but merely as a prerequisite to the right to maintain a suit in court.

It has too long been settled to now admit of doubt that where power of jurisdiction is delegated to any public officer or tribunal over a subject matter and its exercise is confided to his or their judgment or discretion, the acts so done are binding and valid as to the subject matter. In other words, Congress, in granting rights to individuals against the Government, is under no obligation to provide a remedy through the courts. It may, if it sees fit, and as it has done in these cases, provide a remedy which shall consist merely of designating a special officer or agency to adjudicate the claim. (*United States* v. *Arredondo*, 6 Pet. 691; *Decatur* v. *Spaulding*, 14 Pet. 497; *United States* v. *California and Oregon Land Company*, 148 U. S. 31; *Pollard* v. *Bailey*, 20

Wall. 520; *Medbury* v. *United States*, 173 U. S. 492; *McLean* v. *United States*, 226 U. S. 374, and numerous other cases.)

The effort has been made to construe the two cases last mentioned as authority for the jurisdiction of the Court of Claims in these cases, and it may safely be assumed that unless something can be found in them to authorize it, the court is without jurisdiction.

In the *Medbury* case, *supra*, it was held that the Court of Claims had jurisdiction, but it was said:

> We do not mean by this decision to overrule or to throw doubt upon the general principle that where a special right is given by statute, and in that statute a special remedy for its violation is provided, that in such case the statutory remedy is the only one, but we hold that such principle has no application to this particular statute, because the statute does not, in our judgment, within the meaning of the principle mentioned, furnish a remedy for a refusal to grant the right given by the statute. (P. 498.)

The statute then under consideration merely provided that when certain facts existed, it should be the duty of the Secretary of the Interior to draw his warrant on the Treasury. The court said that the right which the act gave was the right "to have the Secretary in a proper case issue his warrant in payment of the claim, and until he refused to do so, no wrong is done and no case for a remedy is presented." (P. 497.)

In other words, that act did not provide that upon certain facts being found by the Secretary to exist, a right should accrue, but that there should be a right to have him issue his warrant whenever a certain state of facts actually existed. The *McLean* case, *supra*, is in principle the same. In the present cases, however, the act is entirely different. It establishes a tribunal consisting of the proper accounting officer and the Secretary of War, and creates a liability to pay only what this tribunal determines is due.

Congress could, of course, have provided for an appeal from the action of the special tribunal, or it might have simply made action by it a prerequisite to a suit in court, but, as has been seen, instead of doing this, it has repeatedly and in unmistakable language declared that the action taken should be final and should never be either reopened or again considered.

It is respectfully submitted, therefore, that the Court of Claims has no jurisdiction of any case arising under the act of 1885. Indeed, no court has any jurisdiction in such cases, unless, perhaps, if the officers designated by the act arbitrarily refused to act and either allow or disallow the claim, an appropriate suit to require their action might be maintained, but if so, whatever action they should then take would be final.

In the present cases it is clear that the court did not have jurisdiction even if the action of the special tribunal could be treated merely as a prerequisite to a suit in court. It must be conceded that in no

event is the question of the value of the property open to determination by the court, or any other agency, excepting the proper accounting officers of the Treasury.

In No. 708 these officers have never fixed the value of the horse in question. The judgment rendered was based upon an independent finding by the court that the value was $200. This is a matter that in any possible view the court had no jurisdiction of, and hence the judgment must be reversed.

The same is true in No. 915. In that case the Secretary of War certified to the value of the articles lost, and the Court of Claims found that the value so certified was reasonable, but it does not appear that the proper accounting officers of the Treasury ever examined into the question of values. The determination of this question has not been committed either to the Secretary of War or to the Court of Claims.

THE MERITS.

If the Court of Claims had jurisdiction to determine whether the circumstances under which the property involved in these judgments was lost bring the cases within the terms of the act of 1885, the judgments of the court are erroneous and the action of the accounting officers of the Treasury is correct. The substance of the act of 1885 is that where property is lost or destroyed in the military service, without fault or negligence on the part of the claimant, it shall be paid for when it was destroyed on

board an unseaworthy vessel, or where it appears that the loss or destruction of the private property was in consequence of the claimant having given his attention to the saving of the property belonging to the United States which was in danger at the same time. It was manifestly not intended to pay for wearing apparel that should be worn out, or a horse that should die from natural causes, or for property lost or destroyed through some accident or mishap which is not peculiar to military service, but may occur anywhere. Therefore Congress specified, as above, the circumstances incident to military service which would warrant the payment.

In No. 708 the horse died from eating oats and barley that had not been properly handled, a thing that was just as liable to occur in civil life as in the military service, and certainly the loss is not under any circumstances specified by the act.

In No. 915 the loss resulted from a storm and flood, which was no more peculiar to military service than to civilian life in the same section of the country. Moreover, it destroyed alike property of the United States and of the appellee, and while it is found that appellee did all that he could to prevent the loss of both, it is not found, as required by the statute, that the loss of his own property was due to his neglecting it in order to save the property of the Government.

SPECIAL STATUTES RELATING TO THE LOSS OF HORSES.

If appellee in No. 708 can not recover under the act of 1885, but little need be said as to his right to

recover under the special statutes relating to the loss of horses, which have been quoted above.

Section 3482 is copied from section 1 of the act of 1849. Unlike the act of 1885, at least its main purpose was to provide for loss in time of war. Indeed, that was probably its only purpose. In any event, it is not possible to bring the present case within its terms, except by referring to the provision that the loss shall be paid for when the death of the horse results "in consequence of the United States failing to supply sufficient forage." In this case it is at least doubtful whether in times of peace the Government is under any obligation to supply forage and hence this provision was manifestly intended to apply only to war times. Moreover, there is no claim that the Government did not furnish an abundance of forage. On the contrary, the claim is that the death resulted, not from insufficiency of forage, but from the fact that it was not as wholesome as it should have been. But this act of 1849, or section 3482 R. S., was amended by the act of June 22, 1874, which, confirming the idea that the original statute was meant to refer only to claims which had arisen in times of war, enacted that no claim should be presented or considered, unless presented prior to the first day of January, 1876.

Congress obviously understood that after that date there could be no payments made under that act, for, by the act of January 9, 1883, it extended the time for filing claims "for horses and equipments lost by officers and enlisted men in the military service of

the United States, which expired by limitation on the thirty-first day of December, eighteen hundred and seventy-five," for a period of one year from the passage of the act, and provided that all claims not filed within that time should be forever barred. And again by the act of August 13, 1888, it was provided "that the limitation heretofore imposed by law on the presentation by officers or soldiers of claims for the loss of horses and equipments in the military service during the late war is hereby suspended for the period of three years."

It follows, then, that long before this claim arose the section of the Revised Statutes referred to had ceased to furnish a remedy.

In conclusion it is respectfully submitted that the judgments in both of these cases are erroneous and should be reversed.

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